NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT MOBIL

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QUESTIONS PRESENTED FOR REVIEW

1. Whether State Courts have subject matter jurisdiction of cases or controversies arising out of operations on the Outer Continental Shelf.

2. Whether the Supreme Ccurt should review a State Court ruling based on state procedural law if such law does not preclude assertion of a federal right.

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, counsel for Respondent Mobil certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this case:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L.A. Levy, Inc.
   Offshore Crews, Inc.
   Kemper Insurance Group
   American Motorists Insurance Company
2. Steven Gaedecke, Plaintiff.
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.
6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

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BRIEF FOR RESPONDENT MOBIL

SUMMARY OF ARGUMENT

I. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq. (Supp. 1979) extended the jurisdiction of the federal courts to cases and controversies arising out of operations on the Outer Continental Shelf. S. Rep. No. 411, 83rd Congress, 1st Sess. (1953). The language of the Act does not explicitly provide that such cases and

controversies are to be heard exclusively in the Federal District Courts.

A grant of jurisdiction to the Federal District Courts does not of itself, imply that jurisdiction is to be exclusive. *United States v. Bank of New York,* 296 U.S. 463, 479, 56 S.Ct. 343, 348, 80 L.Ed. 331 (1936).

The Act provides that the Outer Continental Shelf and artificial islands erected thereon are to be treated as an area of exclusive federal jurisdiction located within a State. Residents of such enclaves are subject to the jurisdiction of State courts.

Where the Act is silent, and a detailed inquiry into the legislative history makes it unclear whether Congress intended jurisdiction to be exclusive, the State Courts have concurrent jurisdiction, whenever by their own constitution they are competent to take it. *Claflin v. Houseman,* 93 U.S. 130 (1876).

The State District Court was not only empowered to take jurisdiction, it had an affirmative obligation to do so in the absence of any valid excuse for refusal to adjudicate. *Mondou v. New York, New Haven & Hartford RR.,* 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327 (1912).

II. The Trial Court's refusal to instruct the jury that its award of damages, if any, would not be subject to federal income taxation was based on a determination of state procedural law. The fact that the State Court's implementation of state procedural law also decided an issue of federal law does not entitle Gulf Offshore to a review of that decision. *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875); *Herb v. Pitcairn,* 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

The State Court's ruling did not have the effect of undermining or invalidating federal law. The procedural rule requiring the kind of proof offered in *Liepelt,* and approved by the Court, is not burdensome and is not aimed at precluding assertion of a federal right. It is founded on the state's interest in maintaining uniform, predictable and familiar procedures. It was based on a specific state procedural rule and was not influenced by the State Court's interpretation of the *Liepelt* decision. The State's insistence on compliance with its procedural rule serves a legitimate state interest. The recognized distinction between the substantive and procedural branches of the independent and adequate state ground doctrine mentioned in *Henry v. Mississippi,* 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) is therefore not applicable.

ARGUMENT ON THE MERITS

There is not and never has been a void in subject matter jurisdiction over disputes arising out of incidents that take place on the Outer Continental Shelf. Gulf Offshore contends that at the time of the passage of the Outer Continental Shelf Lands Act, there was a political jurisdictional void that was filled by the legislation. Gulf Offshore further argues that the extension of federal political jurisdiction to the Outer Continental Shelf results in exclusivity of federal court jurisdiction. It would appear that Gulf Offshore considers *political* jurisdiction synonymous with *judicial subject matter* jurisdiction. These two concepts are highly distinctive, however, and cannot be equated.

The term "jurisdiction" is utilized in many contexts. Indeed, this Court has recognized numerous types of

jurisdiction, involving executive, judicial, and legislative powers: *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 66, 58 L.Ed.2d 292, 299, 99 S.Ct. 383 (1978) (municipal police jurisdiction); *Walters v. St. Louis,* 347 U.S. 231, 232, 98 L.Ed. 660, 663, 74 S.Ct. 505 (1953) (jurisdiction to tax); *Miller Bros. v. Maryland,* 347 U.S. 340, 342, 98 L.Ed. 744, 747, 74 S.Ct. 535 (1953) (jurisdiction to tax, jurisdiction to legislate); *Thompson v. Whitman,* 18 Wall. 457, 465, 21 L.Ed. 897, 900 (1873) (subject matter judicial jurisdiction, inpersonam judicial jurisdiction; in rem judicial jurisdiction); *Shaffer v. Heitner,* 433 U.S. 186, 196, 53 L.Ed.2d 683, 693, 97 S.Ct. 256-9 (1977) (quasi in rem judicial jurisdiction); *Williams v. North Carolina,* 325 U.S. 226, 229, 89 L.Ed. 1577, 1581, 65 S.Ct. 1092 (1944) (jurisdiction to grant a divorce [another facet of subject matter judicial jurisdiction]).

Power to tax is generally restricted to the territory of the state or entity involved. *Walters v. St. Louis, supra.* Power to grant divorce extends only over domiciliaries of a state. *Williams v. North Carolina, supra.* But the exercise of subject matter jurisdiction, over a dispute, by the judicial branch of any government is not limited to events that take place within its territory, or within the area in which it has political jurisdiction. It has long been held that each state may set the limits of the jurisdiction of its own courts and may "entertain in its courts transitory actions, where the cause of action has arisen outside its borders." *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers,* 213 U.S. 55, 70, 53 L.Ed. 695, 702, 29 S.Ct. 397 (1908); *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor,* 210 U.S. 281, 285, 52 L.Ed. 1061, 1064, 28 S.Ct. 616. "[T]he power of a state to effect legal con-

sequences is not limited to occurrences within the state . . ." *Alaska Packers Assn. v. Industrial Accident Commission,* 294 U.S. 532, 541, 79 L.Ed. 1044, 1049, 55 S.Ct. 518 (1934).

Assuming, *arguendo,* that there was no political jurisdiction over the Outer Continental Shelf, it does not follow that a state court could not take cognizance of a cause of action that arose on the Outer Continental Shelf.

The restrictions on a state's judicial subject matter jurisdiction are imposed by the laws of that state as well as the Constitution of the United States. *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers, supra.* Gulf Offshore does not argue that the Texas State Court's jurisdiction over it offends traditional notions of fairness and due process. *See International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The Texas Constitution provides that the district courts are courts of original general jurisdiction and have the power to adjudicate negligence suits. TEX. CONST. art. V, § 8 (1891). There are thus no restrictions on the courts of Texas to adjudicate this matter and were none when the Outer Continental Shelf Lands Act was implemented.

There was at that time a federal judicial jurisdictional void, which the Act filled by creating original *federal* district court jurisdiction. Federal inferior courts have no jurisdiction until Congress grants it. *Kline v. Burke Construction Co.,* 260 U.S. 226, 233-34, 67 L.Ed. 226, 231-32, 43 S.Ct. 79 (1922).

During the Senate debates on the Shelf Lands Act, Senator Price Daniel of Texas stated that prior to May, 1953, the Attorney General of Texas had filed 17 suits on behalf of the State against operators in 17 offshore

fields to enforce the state's conservation laws. Throughout the 26 year period from the passage of the original act until consideration of the 1978 amendments, lawsuits based on controversies arising out of operations on the Outer Continental Shelf were being filed in various state courts. This fact was mentioned in the 1978 Senate debate on the accelerated leasing program and its environmental effects:

> "This list does not include the countless number of suits that have been filed in various State Courts." Congressional Records, August 22, 1978, P. S 13995.

The impediment to the accelerated leasing program caused by the countless lawsuits filed in the federal and state courts was the impetus for the new Section 1349 of the Act which provides for citizens' suits, and contains the revised jurisdiction and venue provisions. H. R. Rep. No., 1835, 95th Congress, 2nd Session (1978).

Concurrent jurisdiction in the state courts of Shelf Lands Act cases has been an assumed fact. A footnote in the opinion of Justice Stewart in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 at p. 303, evidences that understanding:

> "This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case . . . We hold only that the state statute of limitation is a part of the law to be applied in federal court as it would be part of the law to be applied in a state court.

Prior to the enactment of the Outer Continental Shelf Lands Act, the states of Louisiana and Texas in 1938

and 1941, respectively, sought to extend their boundaries to a line in the Gulf of Mexico 27 marine miles from their shorelines. 6 Dart, Louisiana General Statutes (1939) §§ 9311.1-9311.4; Act of May 16, 1941, L. Tex. 47th Legislature, p. 454. In 1947 Texas extended her boundary to the outer edge of the Continental Shelf. Act of May 23, 1947, L. Tex. 50th Legislature, p. 451.

The Original Complaints filed by the United States in *United States v. California,* 332 U.S. 19, 91 L.Ed. 1889, 67 S.Ct. 1658, *United States v. Louisiana,* 339 U.S. 699, 94 L.Ed. 216, 70 S.Ct. 914, and *United States v. Texas,* 339 U.S. 707, 94 L.Ed. 1216, 70 S.Ct. 914, all allege that the respective states, claiming rights in the lands and minerals underlying the Gulf of Mexico adverse to the United States, had made leases under their statutes to various persons and corporations which had entered upon said lands, drilled wells for the recovery of petroleum, gas and other hydrocarbon substances, and paid the respective states substantial sums of money and bonuses, rent, and royalties. The complaints asked for decrees enjoining the states and all persons claiming under them, from continuing to trespass upon the area in violation of the rights of the United States, and requiring the states to account for the money received by them. In all three cases, this Court granted the relief prayed for. It is implausible that the states of California, Louisiana, and Texas were involved in all of the activities alleged in the government's complaints, and at the same time did not provide a forum for adjudication of cases or controversies which arose or might arise out of such activities.

Gulf Offshore's quote from *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969) states the adminis-

tration's opposition to committing the area of the Outer Continental Shelf "solely" to the jurisdiction of state courts. Mobil does not contend that jurisdiction should rest solely in the State Courts, or that federal courts can not interpret, apply and enforce the law.

I.

THE LANGUAGE OF THE ACT SUPPORTS CONCURRENT STATE COURT JURISDICTION

The Court in *Rodrique* paraphrases Subsection (a)(1) of the Act and states that:

> Over the objections of the administration that these [artificial] islands were not located within a State, the bill was amended to treat them "as if [they] were [in] an area of exclusive Federal jurisdiction located within a State." Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352, 365 (1969).

The residents of an area of exclusive federal jurisdiction located within a State are "subject to the process and jurisdiction of state courts". *Evans v. Cornman*, 398 U.S. 419, 26 L.Ed.2d 370, 376, 90 S.Ct. 1752 (1970).

II.

CONGRESSIONAL SILENCE RAISES A PRESUMPTION OF CONCURRENT JURISDICTION

Many federal statutes contain express grants of exclusive jurisdiction to the Federal District Courts: e.g., "The District Courts shall have original jurisdiction of any civil action arising under any act of Congress relating

to patents, plant variety protection, copyright and trademarks. Such jurisdiction shall be exclusive of the courts of the states. . . ." 28 U.S.C. § 1338(a). Where the statute is silent (e.g., the Sherman and Clayton Acts) the Court must develop standards or tests which will establish uniformity and predictability in determining whether Federal Court jurisdiction is exclusive or concurrent.

In *Claflin v. Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1876), the Supreme Court established the following test for exclusivity:

> "The general question, whether State Courts can exercise concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . The result of these discussions has, in our judgment been . . . to affirm the jurisdiction, where it is not excluded by express provision, or by incompatability in its exercise arising from the nature of the particular case." 93 U.S., at 136.

The Court has stated that the *Claflin* test "has remained unmodified through the years", *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507, 7 L.Ed.2d 483, 82 S.Ct. 519 (1962); and "concurrent jurisdiction has been a common phenomenon in our judicial history", *Id.* at 507. Indeed, concurrent jurisdiction is presumed. *California v. Arizona,* 440 U.S. 59, 66, 59 L.Ed.2d 144, 151, 99 S.Ct. 919 (1979).

Gulf Offshore contends that the grant of jurisdiction to the Federal Courts in the Outer Continental Shelf Lands Act "contains no concurrent grant of judicial power to state courts", resulting in a conclusion that

state court jurisdiction was not to apply in the area. This is the same misunderstanding of the law that Professor Redish attributed to the members of Congress when the Clayton Act was passed (i.e., the member's belief that Congress' failure to make jurisdiction explicitly concurrent rendered the jurisdiction exclusively federal). Redish and Muench, *Adjudication of Federal Causes of Action in State Courts,* 75 *Michigan Law Review,* 311, 318 (1976).

III.

THE IMPLIED EXCLUSIVITY EXCEPTION TO THE PRESUMPTION OF CONCURRENT JURISDICTION SHOULD NOT BE APPLIED

The Legislative History Does Not Make Clear that Congress Intended to Preempt the Existing Jurisdiction of the State Courts.

The Congressional Record of the so-called "Tidelands bills" contains over 6,000 pages of testimony and documents from the hearings conducted by the Senate Committee on Interior and Insular Affairs, and the House Judiciary Committee. The jurisdictional clause of both the House and Senate versions of the various bills which were submitted are not significantly different. The question of exclusivity was not directly answered. Quotations in support of or in refutation of exclusivity can be found throughout the Congressional Record. For example, when presenting the report of the Senate Committee on Interior and Insular Affairs, reiterating that committee's statement when it reported Senate Joint Resolution 13, the same Senator Cordon who is quoted in Gulf Offshore's Brief, posed the following question:

> "In what Court, where situated, does jurisdiction lie, or where should it be placed? . . ."

A few moments later, Senator Cordon stated:

> "After the passage of Senate Joint Resolution 13, your committee turned its attention to those questions, and it has tried to bring to the Senate in S. 1901 an answer to at least some of them. . . ." Vol. 99, Part 5, Congressional Record, p. 6962 (1953).

Gulf Offshore's quotation from the Attorney General's statement that: ". . . it is important that the Federal Government, which has the responsibility for handling foreign relations have the exclusive control of lawmaking and law enforcement" is simply a statement of opinion unsupported by any exposition of the reasons for the conclusion. The statement does not clearly address the issue before the Court. No one has or can question the Federal Government's paramount right to make the laws or to enforce them. The question is what Court may interpret and apply the law. The legislative branch has the responsibility to make the law; the executive branch the responsibility for enforcing the law. It may be reasonable to assume that the Attorney General had the judicial branch in mind when he referred to enforcing the law. But, assumptions are not a sound basis for rebutting presumptions.

It is clear from a review of the record, that most of Congress's time was spent on three principle issues:

1. What body of law should be applied?;

2. What use would be made of the revenues realized from development of the mineral resources?; and

3. What portion, if any, of the revenues would be received by the adjacent states?

The quotations from Senators Ellender and Long of Louisiana, contained in Gulf Offshore's Brief demonstrate why Professor Redish believes that total reliance on legislative history may be unwise because it is often self-serving, fragmentary and uncertain. In their attempts to sway their colleagues, both senators described the Act as a further encroachment on State's rights by the Federal government, a confiscation of state property, and an imposition of further administrative expense on the adjacent states. Their interpretations of the meaning and effect of the Act were given in debate in opposition to the passage of the Act. Their interpretations did not persuade and are, therefore, no support for the contention that they reflect the intent of the Congress which rejected or ignored them.

Further review of the same pages of the record from which the quotations attributed to Senators Ellender and Long are taken, further demonstrate the importance of not placing total reliance on legislative history:

> "Mr. Kefauver: May I ask further if state jurisdiction . . . is not extended to the workmen . . . beyound whatever limit might be established? Under what jurisdiction would they come if this amendment were not agreed to?
>
> Mr. Ellender: That is a question I cannot answer. . . ." Vol. 99, Part 5, Congressional Record, p. 7233 (1953).

On the same page can be found the folowing apparently contradictory statements by Senator Long:

> "Mr. Long: Yes. If we could find no federal law applicable, we would use the law of the abutting states; but there would not be state jurisdiction.
>
> Mr. McCarran: If I catch the senator's point, it is proposed to load upon the adjacent state the expense of taking care of the trial.
>
> Mr. Long: Yes."

The same Mr. J. Lee Rankin, Assistant Attorney General of the United States, whose report is quoted by Gulf Offshore was, according to Senator Long, evasive when questioned on the subject of the law and the jurisdiction. According to Senator Long:

> ". . . Mr. Rankin, who testified for the Department of Justice, answered evasively the first three questions I asked him on this subject. I asked him if State Courts should not be able to handle a dispute between state citizens, or if citizens should not be able to avail themselves of state services. His answers were always evasive. He would always say in effect, 'that does not mean that the States should receive any revenue.' " *Id.*, p. 7234.

Despite Mr. Long's comment, a review of Mr. Rankin's statement to the Senate Committee reveals that the specific question of subject matter jurisdiction was never discussed. The only discussion concerned the body of law to be applied. Vol. 99, Part 5, Congressional Record, pp. 625-666 (1953).

The record also discloses that there was considerable misunderstanding among the members of both the House Judiciary Committee and the Senate Interior and Insular Affairs Committee. Senator Price Daniel of Texas commented very late in the Senate debates that the House

bill, H.R. 5134 "does apply state laws and concurrent state jurisdiction." *Id.*, p. 7260. At that stage of the legislation, the language of the jurisdictional clauses of both the House and Senate bills were identical.

The Congressional Record fails to disclose how Congress would have answered the issue of exclusive Federal Court jurisdiction if it had addressed the question directly. In resolving the question Congress might have considered the following determinative factors:

A. Concurrent State Court Jurisdiction Would Not Be Incompatible With The Purpose Of The Outer Continental Shelf Lands Act

The principal objectives of the Outer Continental Shelf Lands Act were provision for the leasing and development of the area by the Federal government, and the exchange of state leases for federal leases in the same area. *U.S. Code Congressional & Administrative News,* 2177, 2177-2178 (1953).

In the so called "quitclaim legislation" the coastal states were given exclusive rights to the resources of the Continental Shelf up to three marine leagues in the case of the Gulf Coast states, and three geographical miles for Atlantic and Pacific states, from their coasts. Pub. L. No. 31, 67 Stat. 29, 43 U.S.C. 1301 et seq. (1953). That act also reaffirmed the jurisdiction, power and control of the United States beyond that point. In effect, the act established the boundaries of the Federal and State control over the seabed and subsoil of the shelf.

The national interests of the United States with respect to treaties, defense, and foreign commerce would not be obstructed or interfered with by a State Court in adjudi-

cating cases or controversies arising out of operations on the shelf. There is no basis for a contention that State courts would treat federal rights any different in Shelf Lands cases than they do in maritime cases.

B. The Need For Uniformity And Predictability Would Not Be Adversely Affected

The Act specifically provides that the body of law to be applied is the Constitution and Laws of the United States, and the civil and criminal laws of each adjacent state, to the extent they are applicable and are not inconsistent with the Act or other federal laws and regulations. 43 U.S.C. § 1333(a)(2). State Courts regularly interpret and enforce federal law. They are required to enforce principles of federal law when they decide state causes of action. *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat) 304 (1860). Gaedecke was injured while working on a service boat performing the traditional work of a seaman. Had he elected to file a Jones Act suit, he could have alleged negligence under that act, and unseaworthiness under the General Maritime Law; and elected to file his suit in any federal or state district court where the court had in personam jurisdiction of the Defendant. 46 U.S.C. § 688. Either court would have been required to apply federal statutory and common law principles. In the present case, had the Plaintiff chosen a federal forum, that court would have been required to apply the state law of Louisiana.

C. Federal Judicial Expertise

No weight should be given to an alleged need for federal judicial expertise. The federal bench is no better equipped to interpret and apply the various bodies of law

applicable to the Outer Continental Shelf than are the judges of the adjacent states. A federal court judge is not ordinarily more knowledgable than a state court judge concerning the state law to be applied. There is no technical problem inherent in cases and controversies filed under the Act which federal judges are better equipped to adjudicate. *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions,* 70 Harvard Law Review, 509 (1957).

Federal Courts frequently experience extreme difficulty in determining what the state law is before applying it. *See Olsen v. Shell Oil Co.,* 561 F.2d 1178, 365 So.2d 1285, 574 F.2d 194.

Since the litigant has the option to choose either a federal or state forum, any alleged harm that follows from his choice is self-imposed, and would not adversely affect the rights of other individual litigants.

State court judges also need exposure to maintain their expertise in interpreting and applying federal law.

D. State Courts Would Not Discourage Or Be Hostile To Actions Arising Out Of Operations On The Outer Continental Shelf

There is nothing in the history of the Act since its passage which would indicate that State Courts might be hostile to litigants or to federal rights. It is the usual case that the litigant who chooses a forum is a citizen of the state in which the action is filed. State Courts would be expected to be receptive to cases or controversies which involve the rights of their own citizens, whether the rights arose under federal or state laws.

E. The Interests Of Federalism Can Best Be Served By Concurrent Jurisdiction

The power and obligation of State Courts to hear federal cases is well established. *Testa v. Katt,* 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947). The individual State's interest in controversies arising offshore and involving its citizens is as strong as in similar cases or controversies involving shore-side causes of action. As Professor Redish states:

> "In adopting a federal system, we have concluded that it is generally appropriate for individual states to establish their own substantive goals for the welfare of their citizens and to determine how to achieve these goals . . . The Supreme Court has chosen not to develop a federal common law to regulate purely private commercial transactions or accidents on land, . . . It is difficult to understand why controversies which arise from occurrences on water are somehow of a different order."

Redish, *Federal Jurisdictions: Tensions in the Allocation of Judicial Power,* p. 115 (1980).

F. Any Uncertainty Or Inconvenience Caused By Forum Shopping Is Unavoidable

A potential litigant in a case arising out of operations on the Outer Continental Shelf cannot validly argue that forum shopping will result in uncertainty, inconvenience or confusion. A party can predict which body of law he may use as a guide in planning his future conduct. The Defendant will not be able to predict whether he will be forced into a state or federal forum, but the outcome of a case is not likely to turn exclusively on the forum

in which the case is brought. The federalism concern with preserving the balance between competing state and federal interests and policies would not be affected by concurrent jurisdiction. Permitting the use of different procedures in state and federal court would not result in a difference in outcome. The unfairness which is alleged to result from the opportunity of a litigant to choose between two court systems applying different law is not applicable with respect to the substantive law which is the same in cases arising out of operations on the shelf regardless of the forum chosen. The differences in the procedural law as between the state and federal courts is not unfair to litigants. That is particularly true in the present case since the state of Louisiana has adopted the Federal Rules of Civil Procedure, and the state of Texas has done likewise to a great extent. While some trial attorneys prefer one forum over the other, the procedural differences are not difficult to comply with. Attorneys practicing in coastal states are regularly exposed to both the state and federal court systems.

The Supreme Court has rejected the argument that it would be "inconvenient and confusing" to apply federal standards of liability in FELA cases and different state standards in others. *Mondou v. New York, New Haven & Hartford RR*, 223 U.S. 1 (1912).

IV.

A STATE COURT IS OBLIGATED TO HEAR CASES AND CONTROVERSIES ARISING OUT OF OPERATIONS ON THE OUTER CONTINENTAL SHELF

State Courts must adjudicate federal claims brought before them. *Mondou v. New York, New Haven & Hart-*

ford RR., Id.; Testa v. Katt, Id. The federal jurisdictional policy that the case load created by a particular federal cause of action should be shared by the federal and state judicial systems requires a State Court to adjudicate federal causes of action unless it exercises its discretion to decline to hear the federal cause of action under the valid excuse doctrine. *Douglas v. New York, New Hampshire & Hartford RR.*, 279 U.S. 377, 388, 73 L.Ed. 747, 49 S.Ct. 355 (1929). In the present case the State Court had no valid excuse to refuse to exercise its jurisdiction. The suit was based on an analogous state created right-common law negligence. Even if it is assumed that a State Court may decline jurisdiction when it is called upon to adjudicate a non-analogous right, that issue did not arise. Even if it had been based on a non-analogous right, the Supreme Court has said:

> "It is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects . . . but it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Mondou v. New York, New Hampshire & Hartford RR., Id.

If each State Court could decide whether to adjudicate federal causes of action, it would be impossible to assure the sharing of the case load by the two judicial systems. Professor Redish concludes that:

> "If the State Courts could frustrate these federal policies by simply declining to adjudicate the federal claims, the concept of federal supremacy would be

> considerably undercut. . . . The resulting unpredictability in the federal judiciary's case load could conceivably hinder congressional decision-making concerning the structure and jurisdiction of the Federal Courts. It, therefore, seems unwise to presume that Congress intended such a result unless, of course, it explicitly provides in the terms of a new statute that State Courts are to be given the power but not the duty to hear federal cases."

Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power,* p. 130 (1980).

Since the legislative history of the Outer Continental Shelf Lands Act is silent or at least unclear and contradictory, the Court might make its own inquiry into the relative weight to be given the above factors. Had Congress considered these factors, it would have expressly provided for concurrent jurisdiction.

V.

WHETHER STATE PROCEDURAL LAW EFFECTIVELY PRECLUDED ASSERTION OF A FEDERAL RIGHT

In *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590 (1875), the Supreme Court rejected the argument that the Court was invested with power to review State Court determinations of state law which had no effect upon federal issues. The Court concluded that such an invasion of state prerogatives is not justified within the federal system. That premise is the basis of the "independent and adequate state ground doctrine". If a State Court decision rests upon a determination of state law, the fact that the state court also decided an issue of federal law does not authorize the Supreme Court to

review the determination of the federal question. Justice Jackson, in *Herb v. Pitcairn,* 324 U.S. 117, 126, reh. den. 325 U.S. 117, 65 S.Ct. 1188 (1945) explained the basis for the doctrine:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

The above discussion applies to situations in which the State Court has decided two substantive legal issues, one state and one federal.

The second basis of the adequate state ground doctrine concerns state procedural rules. In the present case, the State Court refused to give a jury instruction which Appellant contends it was required to give in accordance with the Supreme Court's decision in *Norfolk & Western Ry. Co. v. Liepelt,* 100 S.Ct. 755, 758 (1980). Gulf Offshore failed to comply with the State Court's procedural requirement that an instruction is proper only if it finds support in the evidence and the inferences to be drawn therefrom. See *Bounds v. Caudle,* 560 S.W.2d 925, 930 (Tex. 1977); *Garcia v. Prescott,* 570 S.W.2d 562, 566 (Tex. Civ. App.—Corpus Christi 1978), writ ref'd. n.r.e.; Hodges, *Special Issue Submission in Texas,* 34 (1959).

The Court in *Henry v. Mississippi,* 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) held that the advisory opinion rationale has no application where the state ground is purely procedural. The Supremacy Clause, U.S. Constitution, Art. VI, Clause 2, prevents a state from invalidating federal law through

the use of its own procedural rules. If the State Court's application of its procedural rule had precluded Gulf Offshore from asserting its alleged right to a *Liepelt* instruction, the Supreme Court could review the State Court's decision in order to determine whether or not the procedural rule serves a valid purpose, or merely had the effect of undermining or invalidating federal law. In *Liepelt,* the Court recognized that the calculation of the effect of income taxes on the decedent's past and future earnings was complicated and held that it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings. Such calculations cannot be made by the average jurors without expert testimony concerning the effect of exemptions or exclusions, tax brackets, and tax rates, all of which are subject to change. A jury's computation is not required to conform to strict mathematical calculation, but it should be based on evidence and not pure speculation. The Court did not suggest that a jury instruction should be used as a substitute for the required proof. As stated by the Court:

> ". . . The trial bench has developed effective methods of presenting essential elements of an expert calculation in a form that is understandable by juries. . . ."

Norfolk & Western Ry. Co. v. Liepelt, Id. at 758.

Evidence of the impact of future income taxes in calculating a damages award is a prerequisite to a jury instruction. The requested instruction, unsupported by any evidence which would aid the jury in making a calculation, would allow the very speculation which the

Court has held was too complex for a jury's deliberations. *Johnson v. Penrod Drilling Co.*, 510 Fed.2d 234, 236-37 (5th Circuit), (en banc) cert. denied, 423 U.S. 839, 46 L.Ed.2d 58, 96 S.Ct. 68, 69 (1975).

The Trial Court had no discretion to give the requested instruction. It would have been error to do so.

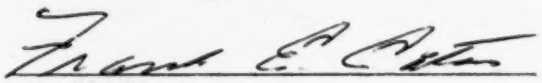
The kind of proof offered in *Liepelt* and approved by the Court is not included in the Trial Court record. The procedural rule requiring such proof is not burdensome and is not aimed at precluding assertion of a federal right. It is founded on the state's interest in maintaining uniform, predictable and familiar procedures. It was grounded on the state law and was not influenced by the State Court's interpretation of applicable federal law. The state's insistence on compliance with its procedural rule serves a legitimate state interest. Therefore, the recognized distinction between the substantive and procedural branches of the independent and adequate state ground doctrine mentioned in *Henry v. Mississippi, Id.* at 447, is not applicable.

CONCLUSION

For the foregoing reasons, the Court should affirm the Judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. Costs should

be taxed against Gulf Offshore Company, a Division of the Pool Company.

Respectfully submitted,



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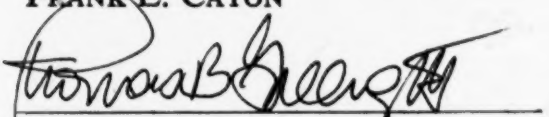

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